IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 614.

CHARLES L. BAENDER, APPELLANT,

vs.

FRANK BARNET, AS SHERIFF OF ALAMEDA COUNTY, CALIFORNIA, RESPONDENT.

SUPPLEMENTAL BRIEF ON JURISDICTION IN THE SUPREME COURT TO CONSIDER THE VALIDITY OF THE ACT ON THIS APPEAL FROM THE DENIAL OF A PETITION FOR WRIT OF HABEAS CORPUS.

This supplemental brief is filed after argument by permission of court on the jurisdictional question here.

In *Ex parte* Siebold (*Habeas Corpus* Cases), 100 U. S., 371, judges of election in the city of Baltimore were tried and convicted in the Circuit Court of the United States for the District of Maryland. They applied to this court for the writ of *habeas corpus*. This court, speaking by Mr. Justice Bradley (page 376), said:

"Without attempting to decide how far this may be regarded as law for the guidance of this court, we are clearly of opinion that the question raised in the cases before us is proper for consideration on *habeas corpus*. The validity of the judgment is assailed on the ground that the acts of Congress under which the indictments were found are unconstitutional. If this position is well taken, it affects the foundation of the whole proceedings. *An unconstitutional law is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void and cannot be a legal cause of imprisonment.* It is true, if no writ of error lies, the judgment may be final, in the sense that there may be no means of reversing it. *But personal liberty is of so great moment in the eye of the law that the judgment of an inferior court affecting it is not deemed so conclusive, but that, as we have seen, the question of the court's authority to try and imprison the party may be reviewed on habeas corpus by a superior court or judge having authority to award the writ.* We are satisfied that the present is one of the cases in which this court is authorized to take such jurisdiction. We think so, because, if the laws are unconstitutional and void, the circuit court acquired no jurisdiction of the causes. Its authority to indict and try the petitioners arose solely upon these laws." Italics ours.)

In *Ex parte* Yarbrough (110 U. S., 651), this court examined, on a petition for writ of *habeas corpus*, the validity of an act of Congress under which petitioners had been convicted and sentenced in the Circuit Court of the United States for the Northern District of Georgia. Mr. Justice Miller, for the court, said:

"This, however, leaves for consideration the more important question, the one mainly relied on by counsel for petitioners, whether the law of Congress, as found in the Revised Statutes of the United States, under which the prisoners are held, is warranted by

the Constitution or, being without such warrant, is null and void.

"If the law which defines the offense and prescribes its punishment is void, the court was without jurisdiction and the prisoners must be discharged." (*Loc. cit.*, 654. Italics ours.)

In Minnesota *vs.* Barber (136 U. S., 313), this court on writ of *habeas corpus* reviewed an appeal from the judgment of the Circuit Court for the District of Minnesota discharging, under a writ of *habeas corpus*, a person imprisoned under a conviction before a justice of the peace in Minnesota, on the ground that the Minnesota act was unconstitutional.

In *Ex parte* Medley (134 U. S., 160), this court granted a petition for a writ of *habeas corpus* and ordered a prisoner discharged from imprisonment who had been convicted under an unconstitutional act of the legislature of Colorado.

While this court has said that the writ of *habeas corpus* cannot be used in lieu of a writ of error (*Ex parte* Carll, 16 Otto, 521), so as to review ordinary errors occurring in the case (Collins *vs.* Johnston, 237 U. S., 502, although in that case the court went fully into the merits) and will not interpose the writ of *habeas corpus* where the petitioner has not yet invoked the action of the trial court upon the pleadings (*Ex parte* Lancaster, 137 U. S., 393), and has said that errors committed in a State court, not affecting the jurisdiction of the court, are not reviewable on *habeas corpus* (Wood *vs.* Brush, 140 U. S., 278), it has been held that the writ could be invoked in order to protect the petitioner from imprisonment under an unconstitutional law, either State or Federal, and the cases show that, while the rule against using the writ of *habeas corpus* to take the place of writ of error is preserved, this rule does not under the cases first above cited apply where the very law under which imprisonment occurs is alleged to be unconstitutional and void, no court in case the law be void having any jurisdiction to sentence the prisoner.

In *Ex parte* Royall (117 U. S., 241), Mr. Justice Harlan for the court stated that it was clear that if the local statute under which petitioner was indicted was repugnant to the Constitution, the prosecution against him had nothing upon which to rest, and the entire proceeding was a nullity, and the court cited with approval the Siebold and Yarbrough cases, *supra*.

We find that this court has considered cases and adjudicated them on the merits, both in petitions originally presented to this court and on appeal from the inferior courts, both on cases arising under Federal acts and on cases arising under State acts, where the prisoners had been convicted and sentenced and then by a petition for a writ of *habeas corpus* claimed their liberty, on the ground that the act denouncing the offense for which they were sentenced was unconstitutional and void.

The language used by Mr. Justice Pitney in Collins *vs.* Johnston (237 U. S., 505), that "it is unnecessary to enlarge upon the doctrine, thoroughly established and recently restated, that in *habeas corpus* proceedings we are confined to the examination of fundamental and jurisdictional questions, and that the writ cannot be employed as a substitute for a writ of error," citing Frank *vs.* Mangum, 237 U. S., 309, covers those cases in which mere error is attempted to be reviewed, although, as stated, the court in the Collins case did go into the merits; but counsel for the appellant in this case is convinced that the clear distinction is made in the judgments of this court, that where petitioner grounds his claim to liberty on the unconstitutionality of the act, by virtue of which alone he is imprisoned, review can be had by writ of *habeas corpus* after conviction, whether he has pursued his remedy by way of writ of error or not, at any time during the proceedings. The fundamental thing is his claim that he is in prison under a void act.

There are cases holding that the Federal court will not

interfere with the writ of *habeas corpus* in behalf of a prisoner accused in a State court until he has exhausted his relief within the State courts (Markuson *vs.* Boucher, 175 U. S., 184; Whitten *vs.* Tomlinson, 160 U. S., 231). The case at bar is a case, however, exclusively within the Federal system. The petitioner is now imprisoned, and asserts his right to be liberated on the sheer ground of the unconstitutionality of the act. Applying the rule above quoted from *Ex parte* Siebold, as pronounced by Mr. Justice Bradley, it is respectfully submitted that the court should find here that it is not considering any question of mere error but, as mentioned by Mr. Justice Pitney in Collins *vs.* Johnston, "fundamental and jurisdictional questions," and is dealing with a conviction and present imprisonment, not merely erroneous but, if the act be unconstitutional, a conviction and present imprisonment that are illegal and void.

The court will note that the district judge below conceived that there there was no question presented on this petition for the writ of *habeas corpus* as to the court's jurisdiction under the circumstances to entertain the petition, but decided the case without this question being raised on the merits of the validity of the act. It is submitted that this court should take jurisdiction and consider the merits as to the validity of the third clause of section 169 of the Criminal Code.

As to the Meaning of the Words "Without Lawful Authority," Appearing in the Third Clause in Section 169.

The words "without lawful authority," appearing in section 169, do not furnish a provision excusing ignorant possession from the inhibition and punishment of the section.

The only possession "with lawful authority" must be possession by a workman in the mint or other officer of the Government, or a person who could show official authority for having dies, hubs, or molds in his possession.

Ignorant possession, as claimed in this case and asserted to the court below at time of conviction, could, of course, never be possession with lawful authority. Any person in possession of these articles, except one with express authority from official source, is a violator of the section, however innocent and without knowledge or intent the possessor may be.

It is submitted again, as stated on argument and briefs, that the various constructions of the section attempted by the courts below, so as to read into the section the element of intent, said to have been acknowledged by the prisoner on his so-called plea of guilty, amount to judicial amendment of the provision in the attempt to make the law valid; and that these constructions or any occurrence in the proceedings below cannot be tolerated to give the effect of validity to an otherwise invalid act, when Congress has expressly eliminated the element of knowledge and intent from the offense attempted to be created, and left the accused helpless to escape conviction except it be by the grace and discretion of the court, or the generosity of the jury. *See cases cited on principal brief for appellee.* No plea of guilty in regular or irregular form to a charge under a void act can make the act speak as good law, and any imprisonment thereunder must be illegal.

Conclusion.

In conclusion, it is submitted that appellant is entitled to an examination by this court of the merits of his case on his appeal from the denial of his petition for a writ of *habeas corpus;* and that the third clause of section 169 of the Criminal Code, under which he is imprisoned, is unconstitutional and void.

Respectfully submitted,

LEVI COOKE,
Attorney for Appellant.

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